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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In its opposition to the Petition for a Writ of Certiorari, the respondent (at page 8) has cited *Thomson Machine Works Co.* v. *Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (N.D. Calif.). This case was also cited by the court below in its opinion (Pet. App. 7a). The *Lake Tahoe* case is inapplicable herein since it involved an action to quiet title and foreclose a mechanic's lien upon propeller shafts, title to which had been transferred to the Government under a default clause identical to the one in the Rice contract. In the *Lake*

Tahoe decision it was clearly stated that *until the right of the Government to acquire title upon default termination was exercised, the title to supplies acquired for the performance of the contract remained in the contractor.* The District Court stated (at p. 915):

> There is no question but that title to the propeller shafts was always in Tahoe. When Tahoe transferred title to the Government, title as to the vessels and materials vested in the Government.

Further, the court below erred in its reading of the *Lake Tahoe* decision insofar as that decision analyzed this Court's decision in *United States* v. *Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910). The District Court had distinguished the partial payment provisions in the Mohawk and Galveston contracts (in the *Ansonia* case), saying "no provision was contained in the contracts for these vessels as to passing of title." The District Court could not have been referring to the complete contracts, for, as we pointed out (Pet., p. 12), there was a default clause in the Galveston contract (clause 13, appearing at p. 230 of the *Ansonia* record) which provided for passage of title to the Government in the event of default. The fact that there was a default clause in the Galveston contract as in the Rice contract has been overlooked by the Government, by the court below and by the United States District Court for the Northern District of California. If the decision below is allowed to stand, the erroneous interpretation of the *Ansonia* decision will be perpetuated.

The Government's brief has glossed over the fact that the decision below was predicated on the theory of the Government having "inchoate title" to supplies and materials in the possession of its contractor even

before the default clause came into operation. It has also ignored the fact that the default clause is in use in almost all Defense Department contracts. Both these points were discussed at length in our petition.[1]

The Government's failure to discuss the petitioners' third point, that the decision below deals with an important question of Federal contract law, must be considered as amounting to a tacit acquiescence as to the correctness of petitioners' argument on this point.

It is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Of Counsel:

BURTON R. THORMAN

Dated: September 11, 1959

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[1] The Government's argument in its footnote 7 (p. 8) has been discussed in our petition (Pet., p. 13, fn 3). It may be observed that the decision below, although taking cognizance of the paramount lien provision, did not use defendant's argument as a basis for its decision. At the time Rice delivered to the Government the "Instrument of Transfer of Title under Contract NObs-3572," the materials and supplies delivered to the Government had a value, based upon costs incurred by Rice, of at least $57,158.03 more than the Government had advanced by way of progress payments; this was more than sufficient to pay all of petitioners' liens.